

72-10-01

8/26/01

Upon reasonable basis, information, and belief, I hereby certify, to the best of my knowledge, that this correspondence, including those papers, letters, or fees, if any, listed below or otherwise referred to as attached, enclosed, or otherwise affixed hereto, is being deposited with the U.S. Postal Service on the date set forth below with sufficient postage as Express Mail Post Office to Addressee in an envelope addressed to: Box DAC, Commissioner for Patents and Trademarks, Washington, D.C. 20231.

EF062174514US  
Express Mail Mailing Label Number

Nov. 13, 2001  
Date of Deposit

Jerry L. Lethin  
Name of Person Certifying Deposit

Jerry L. Lethin  
Signature of Person Certifying Deposit



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application: 09 / 767,422  
Date of Deposit: January 19, 2001  
Filing Date: January 19, 2001  
Date of Re-deposit: January 22, 2001  
Assigned Filing Date: January 22, 2001  
Title: SYSTEM AND METHOD FOR CONDUCTING ELECTRONIC  
COMMERCE  
Applicants: Schroeder et al.  
Group Art Unit: 2164  
Examiner: To Be Assigned  
Attorney Docket: 030633.0010

PETITION FOR CORRECTED FILING DATE UNDER  
37 C.F.R. §§ 1.6, 1.10, 1.181, 1.182, AND 1.183

Box DAC  
Commissioner for Patents and Trademarks  
Washington, D.C. 20231

12/11/2001 AWDHDAF1 00000154 09767422

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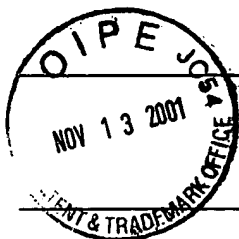
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**PETITION FOR CORRECTED FILING DATE UNDER  
37 C.F.R. §§ 1.6, 1.10, 1.181, 1.182, AND 1.183**

Box DAC  
Commissioner for Patents and Trademarks  
Washington, D.C. 20231

Dear Sir:

Applicants<sup>1</sup> respectfully petition the Commissioner<sup>2</sup> to correct a discrepancy between the date of deposit - January 19, 2001 - of the above-captioned patent application and related correspondence (collectively, "Patent Application") (Exhibit A) and the filing date assigned by the Patent and Trademark Office ("PTO") - January 22, 2001.

Applicants make this petition because the United States Postal Service ("USPS") has jeopardized Applicants' foreign patent rights by violating Federal standards and local USPS practices upon receiving the Patent Application which was \$2.25 short in postage. These facts are made more egregious because less than one week prior to Applicants' mailing of the Patent Application, the USPS followed the very same applicable Federal Standards and local USPS practices and forwarded a shortpaid Express Mail item mailed by Applicants' attorneys without returning it.<sup>3</sup> Yet when faced with the same situation with respect to Applicants, the USPS failed to forward the Patent Application and refused to allow Applicants to affix additional postage to the original Express Mail package containing the Patent Application. This forced Applicants to enclose

<sup>1</sup> "Applicants" is meant to include the listed inventors, their assignee, attorneys and agents unless the context indicates otherwise.

<sup>2</sup> Effective March 29, 2000, Congress changed the title of the Commissioner for Patents and Trademarks to the Director of the U.S. Patent and Trademark Office. However, because Title 35 of the United States Code, Title 37 of the Code of Federal Regulations, and the Manual of Patent Examining Procedure, June 1998, 7<sup>th</sup> Edition ("M.P.E.P.") refer to the position by the former title, Applicants have used the historical title.

<sup>3</sup> This USPS failure was compounded by the USPS' failure to have a Postal clerk available for accepting the Patent Application when it was delivered to the Post Office. The day before the Patent Application was mailed, the secretary of Applicants' attorney was told by the very same Post Office that Express Mail would be accepted until 9:30 p.m. Yet when Applicants' messenger arrived at the Post Office before 9:00 p.m., there were no accessible Postal clerks present to accept the Patent Application.

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the original Express Mail package in a second Express Mail package, which Applicants mailed immediately. The USPS admitted its mistake and offered a postage refund – a hollow offer in the face of potentially losing foreign patent rights. Fortunately, Applicants maintained the integrity of the original Express Mail package enabling them to unequivocally prove that the USPS received the Patent Application on January 19, 2001.

But for the USPS' violation of Federal standards and its own local practices, the Patent Application would have been delivered to the PTO as intended and received January 19, 2001 as its filing date.

## **I. STATEMENT OF FACTS**

### **A. Applicants deposited the Patent Application as Express Mail with the USPS on January 19, 2001.**

On Friday, January 19, 2001, Applicants placed and sealed the Patent Application in an envelope bearing Post Office to Addressee Express Mail Mailing Label EF062434188US ("Original Express Mail Label.")<sup>4</sup> Applicants then affixed \$13.75 in metered postage to that envelope,<sup>5</sup> and delivered it to the General Mail Facility at 8225 Cross Park Drive, Austin, TX 78710 ("Applicants' Post Office").<sup>6</sup> Applicants' messenger had been specifically instructed to hand deliver the Patent Application to a Postal clerk to have the Express Mail receipt completed so it could be returned to Applicants' attorney.<sup>7</sup> But when the messenger arrived at the Applicants' Post Office, there were no accessible Postal clerks present to accept the Patent Application, despite the USPS' express assurances the day before.<sup>8</sup> Therefore, Applicants' messenger deposited the Patent Application into a First Class Mail drop box at the Applicants' Post Office before that day's last scheduled mail

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<sup>4</sup> Affidavit of Carol L. Treble ("Treble Aff.") (Exhibit B).

<sup>5</sup> Affidavit of Christopher A. Baker ("C. Baker Aff.") (Exhibit C).

<sup>6</sup> Declaration of Kelly M. Byrd ("Byrd Decl.") (Exhibit D); Affidavit of Jeffery M. Baker ("J. Baker Aff.") (Exhibit U); C. Baker Aff. (Exhibit C).

<sup>7</sup> Treble Aff. (Exhibit B); J. Baker Aff. (Exhibit U); Byrd Decl. (Exhibit D).

<sup>8</sup> Treble Aff. (Exhibit B); Byrd Decl. (Exhibit D).

pickup.<sup>9</sup> In addition, Applicants' duly executed Certificate of Mailing under 37 C.F.R. § 1.10 certifies January 19, 2001 as the date of deposit of the Patent Application as Express Mail with the USPS.<sup>10</sup>

**B. The Patent Application entered the U.S. mailstream on January 19, 2001.**

The USPS received the Patent Application at 9:27 p.m. on January 19, 2001,<sup>11</sup> noting "1/19/01" as the date-in on the Original Express Mail Label.<sup>12</sup> Moreover, the USPS informed Applicants that the USPS' computerized track/confirm system indicated that the Patent Application "entered the mailstream on January 19, 2001."<sup>13</sup>

**C. Contrary to Federal standards and local USPS practices, the USPS returned the Patent Application on January 22, 2001, and Prevented Applicants from Rectifying the Short Postage.**

The Patent Application was endorsed with \$13.75 in metered postage, which corresponds to the proper postage for Express Mail Custom Designed Service. Full postage for items sent Express Mail Next Day Service, Post Office to Addressee, such as the Patent Application, was \$16.00.<sup>14</sup>

On Monday January 22, 2001, the USPS returned the Patent Application endorsed "short postage."<sup>15</sup> The USPS' failure to forward the Patent Application despite the "short postage" contravened both Federal USPS standards and local USPS practices. After returning the Patent Application, the USPS prevented Applicants from rectifying the \$2.25 "short postage" on January 22, 2001 by affixing additional postage. Instead, the USPS required Applicants to place the Patent

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<sup>9</sup> Byrd Decl. (Exhibit D).

<sup>10</sup> Patent Application (Exhibit A) and Affidavit of John H. D'Antico ("D'Antico Aff.") (Exhibit F).

<sup>11</sup> Express Mail Tracking & Delivery Confirmation EF062434188US ("Original Express Mail Confirmation") (Exhibit G).

<sup>12</sup> Original Express Mail Label (Exhibit H).

<sup>13</sup> Letter of Albert Prewitt ("Prewitt Letter") (Exhibit I).

<sup>14</sup> These postage rates reflect rates effective on the dates of deposit and redeposit of the Patent Application. United States Postal Service Domestic Mail Manual, Issue 56, January 7, 2001 ("DMM") § R500.1.0 (various sections of the DMM are attached as Exhibit J).

<sup>15</sup> Original Express Mail Label (Exhibit H).



Application into a new envelope or wrapper.<sup>16</sup> Subsequently, the USPS explicitly admitted its error. Ms. Debbie Polunko, who then worked in the Applicants' Post Office "Expedited Services" department, informed Applicants that the Patent Application should have been forwarded even though there was "short postage" attached.<sup>17</sup> Further, the USPS implicitly admitted its mistake by offering to refund Applicants' postage and expressed "regret [for] any inconvenience this may have caused."<sup>18</sup> Applicants did not consciously, knowingly, or deliberately affix \$13.75 in postage for Express Mail Custom Designed Service instead of \$16.00 in postage for Express Mail Next Day Service, PO to Addressee.<sup>19</sup>

**D. The Patent Application was not altered after the original mailing.**

From the time the Post Office returned the Patent Application on January 22, 2001 to the time Applicants re-deposited the Patent Application with Applicants' Post Office that same day, Applicants retained sole and exclusive custody and control of the Patent Application, and never opened the original envelope.<sup>20</sup> Thus, Applicants did not alter the Patent Application, nor do Applicants believe the Patent Application was altered, in any way, after the original January 19, 2001 date of deposit.

**E. Applicants re-deposited the Patent Application as Express Mail with the USPS on January 22, 2001.**

On January 22, 2001, Applicants placed and sealed the Patent Application in a second envelope bearing Post Office to Addressee Express Mail Mailing Label EF062173947US ("Second Express Mail Label.")<sup>21</sup> \$16.00 in postage was then affixed to that envelope.<sup>22</sup> Next, Applicants

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<sup>16</sup> Affidavit of David A. Porter ("Porter Aff.") (Exhibit K).

<sup>17</sup> Porter Aff. (Exhibit K).

<sup>18</sup> Prewitt Letter (Exhibit I). In the very same letter in which the USPS implicitly admits its mistake, the USPS claims to have properly handled the Patent Application. *Id.* Yet in purporting to state the applicable standard, DMM P011.1.6, the USPS misquotes the language. That standard does not direct that shortpaid Express Mail be returned.

<sup>19</sup> C. Baker Aff. (Exhibit C).

<sup>20</sup> Porter Aff. (Exhibit K).

<sup>21</sup> Porter Aff. (Exhibit K).

<sup>22</sup> *Id.*

deposited that envelope with the USPS at Applicants' Post Office, before that day's last scheduled mail pickup.<sup>23</sup> The USPS re-received the Patent Application on January 22, 2001.<sup>24</sup> The USPS noted "1/22/01" as the date-in on the Second Express Mail Label.<sup>25</sup> This was confirmed by the USPS' Mr. Prewitt.<sup>26</sup>

**F. The PTO did not assign the January 19, 2001 original date of deposit as the filing date of the Patent Application.**

The PTO received the Patent Application on Tuesday, January 23, 2001.<sup>27</sup> Notwithstanding the USPS' failure to follow Federal standards and local practices upon receiving shortpaid Express Mail, the PTO assigned the January 22, 2001 date of re-deposit as the filing date of the Patent Application, instead of the January 19, 2001 original date of deposit.<sup>28</sup>

**G. Failure to accord a filing date prior to January 21, 2001 may adversely affect Applicants' foreign patent rights.**

On Sunday, January 21, 2001, Applicants released and made accessible to the public software using the invention claimed and described in the Patent Application on its website. Moreover, Applicants intend to file one or more corresponding patent applications in one or more foreign countries that may require absolute novelty as a prerequisite to patentability.<sup>29</sup> Thus, failure to accord January 19, 2001 as the filing date may adversely affect Applicants' foreign patent rights.

**II. THE USPS FAILED TO FOLLOW FEDERAL STANDARDS UPON RECEIVING SHORTPAID EXPRESS MAIL.**

**A. The date of mailing for the Patent Application was January 19, 2001.**

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<sup>23</sup> *Id.*

<sup>24</sup> Express Mail Tracking & Delivery Confirmation EF062173947US ("Second Express Mail Confirmation") (Exhibit L).

<sup>25</sup> Second Express Mail Label (Exhibit M).

<sup>26</sup> Prewitt Letter (Exhibit I).

<sup>27</sup> Second Express Mail Confirmation (Exhibit L); Prewitt Letter (Exhibit I).

<sup>28</sup> Returned Postcard (Exhibit N); and Filing Receipt (Exhibit O).

<sup>29</sup> Affidavit of Patrick J. DeSouza ("DeSouza Aff.") (Exhibit P).

The time and date of mailing for Express Mail Next Day Service items depend on whether a mailer prepays Express Mail postage.<sup>30</sup> If the mailer does not prepay Express Mail postage, the ‘time and date of mailing’ for these items when deposited at designated places is the time and date when the items are presented and accepted.<sup>31</sup> However, if the mailer prepays Express Mail postage, the “time and date of mailing” for these items is the time and date when the items are “brought to the Express Mail acceptance unit.”<sup>32</sup> In any event, “A receipt showing the time and date of mailing . . . serves as evidence of mailing.”<sup>33</sup> As evidenced by the Original Express Mail Label, Applicants brought the Patent Application to the appropriate USPS acceptance unit on January 19, 2001 with prepaid Express Mail postage. Thus, January 19, 2001 is the mailing date of the Patent Application.

**B. The USPS considers Express Mail containing non-zero postage to be fully prepaid, thereby triggering USPS delivery obligations.**

Postage on all mail must, in general, be fully prepaid at the time of mailing.<sup>34</sup> However, if a mailer prepays postage at the time of mailing with less than full postage, the USPS uses different standards for mail received with no postage and mail received with short postage.<sup>35</sup>

Mail received with no postage “is endorsed ‘Returned for Postage’ and is returned to the sender without an attempt at delivery. . . .”<sup>36</sup> Accordingly, only mail items containing zero postage (or an indication that postage fell off) are endorsed “Returned for Postage.”<sup>37</sup> There is no USPS endorsement of “short postage.”<sup>38</sup> As such, the applicable standards for the “Returned for Postage”

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<sup>30</sup> DMM § D500.2.3 (Exhibit J).

<sup>31</sup> *Id.* at § 2.3(a) (emphasis added).

<sup>32</sup> *Id.* at § 2.3(b) (emphasis added).

<sup>33</sup> DMM § S500.1.1 (Exhibit J).

<sup>34</sup> DMM § P011.1.1 (Exhibit J).

<sup>35</sup> *Compare, Id.* at § 1.2 (USPS standards for “mail without postage,” applicable to “matter of any class”) with *id.* at §§ 1.5–1.10 (USPS standards for “shortpaid mail,” various standards applicable to various mail types).

<sup>36</sup> *Id.* at § 1.2. *See also* DMM § F010.1.0(a) (Exhibit J).

<sup>37</sup> DMM § F010 at Exhibit 4.1 (Exhibit J).

<sup>38</sup> *Id.*

endorsement, which apply only to mail pieces “without postage or indication that postage fell off”<sup>39</sup> do not apply to the Patent Application.

A revenue deficiency, on the other hand, “means a shortage or underpayment of postage or fees.”<sup>40</sup> This definition does apply to the Patent Application. More specifically, for shortpaid Express Mail:

For an [Express Mail] item received at the office of mailing without sufficient adhesive or meter stamps, the mailer is contacted to correct the deficiency before dispatch.<sup>41</sup>

Thus, the USPS does not consider shortpaid Express Mail items to be undeliverable, and the USPS rules do not authorize “returned for postage” of shortpaid Express Mail items to the sender without allowing them to correct the deficiency nor without attempting delivery of the Express Mail item directly to the addressee. The USPS violated these standards with respect to the Patent Application.

**C. A returned shortpaid mailpiece can have the additional postage affixed to the original piece and does not have to be placed in a new envelope or wrapper.**

USPS standards specifically allow for a shortpaid mail item to “have the necessary additional postage affixed to the original piece and [it] does not have to be placed in a new envelope or wrapper.”<sup>42</sup> Specifically, “[p]ostage stamps or meter stamps originally affixed to insufficiently prepaid mail are accepted in payment of postage to the amount of their face value when the mail is again presented for mailing.”<sup>43</sup> The USPS violated this standard with respect to the Patent Application. If the USPS had allowed Applicants to affix additional postage to the original Express Mail package, the Patent Application would have received January 19, 2001 as its filing date.

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<sup>39</sup> *Id.*

<sup>40</sup> DMM § P011.4.1 (Exhibit J).

<sup>41</sup> *Id.* at §§ 1.5–1.6 (Exhibit J).

<sup>42</sup> DMM § D042.1.6 (Exhibit J).

<sup>43</sup> DMM § P011.1.10 (Exhibit J).

In summary, the USPS failed to follow at least three of the above-referenced Federal standards:

- the USPS failed to attempt delivery of the Patent Application which was endorsed with “sufficient” postage to trigger the USPS delivery obligation;
- the USPS endorsed the Patent Application with an unauthorized endorsement and improperly returned the Patent Application without first attempting delivery; and
- the USPS prevented Applicants from affixing additional postage to the original Express Mail envelope.

### **III. THE USPS FAILED TO FOLLOW LOCAL PRACTICES UPON RECEIVING SHORTPAID EXPRESS MAIL.**

#### **A. Applicants’ Post Office Instructions Direct That Shortpaid Express Mail Not Be Delayed Due To Lack Of Full Postage.**

The San Antonio District of the USPS, now known as the Rio Grande District of the USPS, manages mail collection at Applicants’ Post Office.<sup>44</sup> The San Antonio District Instructions include No. CSS–95–BC/S–01, effective January 21, 1995, (hereinafter, “Post Office Instructions”)<sup>45</sup> which governs shortpaid Express Mail collection and delivery at Applicants’ Post Office.

According to the Applicants’ Post Office Instructions, if an Express Mail item such as the Patent Application has insufficient postage “an attempt must be made to contact the mailer and correct the deficiency prior to dispatch.”<sup>46</sup> But, “If the mailer cannot immediately correct the deficiency . . . The acceptance clerk will dispatch the Express Mail item.”<sup>47</sup> Quite obviously,

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<sup>44</sup> Second Letter of Marsha L. Howard (“Second Howard Letter”) (Exhibit Q).

<sup>45</sup> Exhibit R.

<sup>46</sup> *Id.* ¶ II(A).

<sup>47</sup> *Id.* at ¶ II(A)–(A)(2).

Applicants' Post Office failed to contact Applicants immediately and delayed the Patent Application - both to Applicants' detriment.

**B. Applicants' Attorneys previously relied on the Applicants' Post Office Instructions to deliver shortpaid Express Mail.**

One week prior to mailing the Patent Application, Applicants' attorneys deposited an Express Mail item with Applicants' Post Office. That item had short postage. Applicants' Post Office and the USPS delivered that item without returning it to the Applicants despite short postage.<sup>48</sup> On January 17, 2001, two days before the Patent Application was mailed, the Applicants' Post Office, notified Applicants, by letter conforming to the Applicants' Post Office Instructions, of the short postage.<sup>49</sup> As detailed above, Applicants' Post Office failed to follow this procedure with respect to the Patent Application, which resulted in the Patent Office assigning a later filing date.<sup>50</sup>

**IV. THE USPS' FAILURE TO FOLLOW FEDERAL STANDARDS AND LOCAL PRACTICES WAS ARBITRARY AND CAPRICIOUS.**

But for the USPS' failure to follow Federal standards and local practices upon receiving the Patent Application as shortpaid Express Mail, the Patent Application would have been delivered to the PTO, as intended, and would have received January 19, 2001 as its filing date. Applicants (and/or their attorneys) were entitled to rely upon, and had previously relied upon, the very same standards and practices for delivery of shortpaid Express Mail to an addressee. The USPS' inconsistent actions make its handling of the Patent Application arbitrary and capricious. Because

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<sup>48</sup> Express Mail Tracking & Delivery Confirmation EF062435872US (Exhibit S)

<sup>49</sup> Letter of Belinda A. Willis (Exhibit T).

<sup>50</sup> To the extent that the Post Office Instructions could be construed to apply only to Express Mail Next Day items, the actions of the USPS described herein prove that is an improper construction. Specifically, the USPS accepted the previous Express Mail package sent by Applicants' attorneys at 7:00 p.m., after the deadline for Express Mail Next Day delivery. (Exhibit S). Nevertheless, the USPS adhered to the Post Office Instructions and did not delay the item and later contacted Applicants' attorneys to rectify the revenue deficiency. Moreover, the Applicants' Post Office had informed the secretary of Applicants' attorney, the day before the Patent Application was mailed, that Express Mail would be accepted until 9:30 p.m. Treble Aff. (Exhibit B). Yet at 9:00 p.m. nobody was available to accept the Patent Application. Byrd Decl. (Exhibit D).

the USPS is a Federal agency,<sup>51</sup> its actions cannot be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, nor contrary to a constitutional right, power, privilege, or immunity.<sup>52</sup> As an agency, the USPS “shall be operated as a basic and fundamental service provided to the people” and is charged with providing “prompt, reliable, and efficient services to patrons in all areas.”<sup>53</sup> Because the USPS failed to provide prompt, reliable, and efficient services to Applicants upon receiving the Patent Application, that inconsistent action was arbitrary and capricious.<sup>54</sup>

**V. THE COMMISSIONER HAS THE RIGHT—AND DUTY—TO ACCORD THE PATENT APPLICATION A JANUARY 19, 2001 FILING DATE.**

Applicants respectfully submit that the Commissioner has the right—and duty—to accord January 19, 2001 as the filing date of the Patent Application in accordance with each of 37 C.F.R. §§1.10(a), 1.10(b), 1.10(c), 1.10(d), 1.10(e), 1.181, 1.182, and 1.183.

**A. Applicants filed the Patent Application in accordance with the Express Mail requirements of 37 C.F.R. § 1.10.**

Section 1.10 of Title 37 of the Code of Federal Regulations governs the filing of papers with the PTO using Express Mail. Section 1.10(b) provides for Express Mail items to be deposited “directly with an employee of the USPS” (to ensure receipt of a legible copy of the “Express Mail” mailing label with the “date-in” clearly marked) and for dealing “indirectly with the employees of the USPS” (such as by deposit in an “Express Mail” drop box). The latter, Section 1.10(b) cautions,

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<sup>51</sup> See, e.g., *Friedlander v. United States Postal Serv.*, 658 F.Supp. 95, 101 (D.D.C. 1987) (“Congress did not intend to create a private business, rather, it desired a more efficient governmental agency.”); *United States v. Bardsley*, 884 F.2d 1024, 1029 (7<sup>th</sup> Cir.1989) (false statements to USPS are false statements to governmental agency); *Baker v. Runyon*, 114 F.3d 668, 669–671 (7<sup>th</sup> Cir.1997) (“We conclude that the [USPS] is a governmental agency for purposes of section 1981a . . . . While this court, as well as the Supreme Court, has recognized the quasi-commercial nature of the [USPS] on several prior occasions, neither court has ever held that the [USPS] is anything other than a federal agency.”) (citations omitted); and *Cleveland v. Runyon*, 972 F.Supp. 1326, 1330 (D.Nev.1997) (“The [USPS] is a ‘government agency’ within the meaning of the 1991 Civil Rights Act . . . .”).

<sup>52</sup> 5 U.S.C. § 706(2) (2000).

<sup>53</sup> 39 U.S.C. § 101 (2000).

<sup>54</sup> *Groz v. Quigg*, 10 U.S.P.Q.2d 1787, 1788 (D.D.C. 1988) (“there is strong authority for the proposition that agency action inconsistent with its own precedent is arbitrary and capricious.”).

is done at the risk of not receiving a copy of the “Express Mail” mailing label with the desired “date-in” clearly marked.

Those cautionary words do not apply here because Applicants deposited the Patent Application as Express Mail and **received a legible copy of the Original Express Mail Mailing Label with the January 19, 2001 date-in clearly marked.** Moreover, the Patent Application was marked with the Original Express Mail Mailing Label number as required.<sup>55</sup>

According to Section 1.10(a), correspondence received by the PTO by Express Mail will be considered filed in the PTO on the date of deposit with the USPS as “shown by the ‘date-in’ on the ‘Express Mail’ mailing label or other official USPS notation.”<sup>56</sup> And importantly, the M.P.E.P. provides that correspondence sent by Express Mail that is “actually received” by the PTO will “not be denied a filing date as of the date of deposit as ‘Express Mail’ simply because the correspondence was not mailed with sufficient postage.”<sup>57</sup>

Although now permissive as opposed to required under 37 C.F.R. § 1.10(b), the Patent Application included a Certificate of Mailing under 37 C.F.R. § 1.10 and the Original Express Mail Label number EF062434188US was placed on the Patent Application (and related correspondence) prior to mailing.<sup>58</sup>

Elimination of the requirement for a Certificate of Mailing under 37 C.F.R. § 1.10 was adopted primarily to streamline the PTO’s processing of Express Mail correspondence. Under the old rule, the PTO would have been required to scrutinize the Certificate of Mailing under 37 C.F.R. § 1.10 as well as the Original Express Mail Label and the Second Express Mail Label. Even under the new rule, the date-in on the Original Express Mail Label should have been the only date to

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<sup>55</sup> Patent Application (Exhibit A).

<sup>56</sup> 37 C.F.R. 1.10(a).

<sup>57</sup> M.P.E.P. § 513.

<sup>58</sup> Patent Application (Exhibit A).



which the PTO looked to determine the filing date. Under the prior rule, the Certificate of Mailing under 37 C.F.R. § 1.10 would have served, at least in Applicants' case, as proof of a date of deposit to the extent the certificate date was the same as the "date-in" on the Original Express Mail Label. Alternatively, it would have been evidence of Applicants' good faith intent to deposit the Patent Application as Express Mail with the USPS on January 19, 2001. The certificate would have afforded protection to Applicants to the extent the certificate date did not differ from the Original Express Mail Label "date-in" but did differ from the Second Express Mail Label "date-in." Therefore, the elimination of the Certificate of Mailing under 37 C.F.R. § 1.10 requirement eliminated, at least in Applicants' case, a reliable mode of proving the date of deposit, or alternatively, of Applicants' good faith intent to deposit the Patent Application on as Express Mail with the USPS January 19, 2001.

Moreover, to the extent 37 C.F.R. § 1.10(b) no longer requires a Certificate of Mailing by Express Mail, it is no longer required that only the person mailing the Patent Application sign the certificate. Rather, upon signing the Certificate of Mailing under 37 C.F.R. § 1.10, Applicants had reasonable basis to expect that the Patent Application would be mailed or transmitted to the PTO on or before the date indicated.<sup>59</sup> More specifically, Applicants signed the Certificate of Mailing under 37 C.F.R. § 1.10 upon information and belief, expecting the Patent Application to be mailed or transmitted in the normal course of business by another no later than the date indicated, as required.<sup>60</sup> Applicants' reasonable basis and information and belief were based upon prior practices, procedures, and experiences, which Applicants had been previously relied upon to successfully accomplish the indicated task.<sup>61</sup>

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<sup>59</sup> D'Antico Aff. (Exhibit F).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

**B. Applicants file this Petition pursuant to 37 C.F.R. §§ 1.10(c), 1.10(d) and 1.10(e).**

Section 1.10 provides three different means of petitioning the PTO to modify a filing date accorded by the PTO to a patent application. These three means are for handling situations in which: (1) the filing date accorded by the PTO and the “date-in” on the Express Mail mailing label differ (37 C.F.R. § 1.10(c)); (2) the “date-in” on the Express Mail mailing label was incorrectly entered or omitted by the USPS (37 C.F.R. § 1.10(d)); and (3) the correspondence was not received by the PTO (37 C.F.R. § 1.10(e)). This petition is proper under each of these three sections and Applicants have complied with each of the requirements of each of Sections 1.10(c)-(e).

Each of the three methods of petitioning set forth in Section 1.10 require that the petition be filed promptly. Applicants became aware that the PTO had not accorded the Patent Application a filing date of January 19, 2001 upon receipt of the official Filing Receipt on March 13, 2001.<sup>62</sup> Applicants have researched the applicable Federal USPS standards and local USPS practices. Applicants further researched the relevant case law and performed factual investigations – which included locating witnesses from whom affidavits or declarations were obtained – in order to prepare a complete and accurate petition.<sup>63</sup>

Each of the three methods of petitioning pursuant to 37 C.F.R. § 1.10 also require that the number of the Express Mail mailing label have been placed on the papers and/or fees prior to the original mailing. Applicants have complied with those provisions as well, as evidenced by the Patent Application attached as Exhibit A.

It is at this point that the three petition methods diverge in their requirements. Nevertheless, Applicants have met each of the additional requirements. In addition to the two foregoing petition requirements, a petition under Section 1.10(c) must include a true copy of the Express Mail mailing

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<sup>62</sup> Exhibit O.

<sup>63</sup> *Nitto Chem. Indus. Co., Ltd. v. Comer*, 39 U.S.P.Q.2d 1778 (D.D.C. 1994)(petition filed thirteen (13) months after original application filed not found to be untimely).

label showing the “date-in.”<sup>64</sup> A true copy of the Original Express Mail Label is included as Exhibit H. It shows a “date-in” of January 19, 2001. The Original Express Mail Label,<sup>65</sup> when considered in conjunction with the affidavit of Applicants’ courier<sup>66</sup> and the USPS letter concerning the last time of pickup,<sup>67</sup> demonstrates that Applicants have also met the third and final requirement of a Section 1.10(d) petition—a showing that the requested filing date (i.e., January 19, 2001) was the date the Patent Application was deposited and that the deposit was “prior to the last scheduled pickup for that day.”<sup>68</sup> The Original Express Mail Label—with the “date-in” filled in—is evidence from the USPS (and also evidence that came into being after deposit and within one business day of deposit, as required) that the requested filing date was the date of deposit of the Patent Application.<sup>69</sup> Moreover, the Original Express Mail Label is corroborated by substantial external evidence.<sup>70</sup> Moreover, Applicants submit that consideration of this petition is proper under 37 C.F.R. § 1.10(d) because January 22, 2001 should not have been entered as the “date-in” for the Patent Application.<sup>71</sup>

The third method of petition—under Section 1.10(e)—has two additional requirements.<sup>72</sup> First, Section 1.10(e) requires that applicants include a variety of documents which in this case comprise, in effect:

(1) The Patent Application showing the Express Mail mailing Label number—this is attached as Exhibit A;

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<sup>64</sup> 37 C.F.R. § 1.10(c)(3).

<sup>65</sup> Exhibit H.

<sup>66</sup> Exhibit D.

<sup>67</sup> Exhibit E.

<sup>68</sup> 37 C.F.R. § 1.10(d)

<sup>69</sup> 37 C.F.R. § 1.10(d)(3).

<sup>70</sup> See, e.g., Ltr. of Marsha L. Howard (Exhibit E); Original Express Mail Confirmation (Exhibit G); Prewitt Ltr. (Exhibit I); Second Howard Ltr. (Exhibit Q); Post Office Instruction (Exhibit R); and Ltr. of Belinda A. Willis (Exhibit T).

<sup>71</sup> DMM § D042.1.6 (Exhibit J).

<sup>72</sup> 37 C.F.R. § 1.10(e).

- (2) a copy of any returned postcard receipt—this is attached as Exhibit N;
- (3) a copy of the Express Mail Mailing Label showing the “date-in”—this is attached as Exhibit H;
- (4) a copy of any other official notation by the USPS relied upon to show the date of deposit—these are attached as Exhibits G and I; and
- (5) to the extent necessary a showing under 37 C.F.R. § 1.10(d)(3)—this is discussed in the immediately preceding paragraph.<sup>73</sup>

The last requirement of a Section 1.10(e) petition is a statement establishing the original deposit of the Patent Application and that the copies of the documents referred to in Section 1.10(e)(3)—detailed above—are true copies of the originally mailed documents. Such a statement is included in the D’Antico Affidavit attached as Exhibit F.<sup>74</sup> Applicants submit that consideration of this petition is proper under 37 C.F.R. § 1.10(e) because when Applicants deposited the Patent Application under the Original Express Mail Label, the Patent Application was either 1) actually received by the PTO on January 23, 2001 as originally mailed on January 19, 2001, and thus petitionable under 37 C.F.R. § 1.10(c)–(d); or alternatively, 2) never received by the PTO as originally mailed on January 19, 2001, and thus petitionable under 37 C.F.R. § 1.10(e).<sup>75</sup>

**1. Applicants met the standard of care required by 37 C.F.R. § 1.10.**

The M.P.E.P indicates that oversights that can be “avoided by the exercise of reasonable care” will not suffice for purposes of a petition under 37 C.F.R. § 1.10.<sup>76</sup> The arbitrary and capricious acts of the USPS in handling the Patent Application were outside the Applicants’ control.

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<sup>73</sup> 37 C.F.R. § 1.10(e)(3).

<sup>74</sup> While Applicants do not believe a fee is due in conjunction with any 37 C.F.R. § 1.10(c)–(e) petitions, Applicants hereby authorize the Commissioner to charge any and all fees required by this Petition to Applicants’ Deposit Account 50-1273.

<sup>75</sup> Applicants also have met the § 1.10(e) requirement that the correspondence be properly addressed (*see* Exhibit A) and have “sufficient postage” (*see* Sections II-III herein).

<sup>76</sup> M.P.E.P. § 513

Those acts were not “avoidable” by the Applicants. The M.P.E.P. further indicates that “inadvertent failure to comply with the requirements of a rule” is not a situation warranting waiver under 37 C.F.R. § 1.183.<sup>77</sup> Applicants do not rely solely on inadvertent failure to affix proper postage. That act alone would not have caused a delay in the filing date if the USPS had followed the applicable Federal standards and its own local rules for such shortpaid mail. Accordingly, the precedent cited by the M.P.E.P. as setting the standard of care, are inapplicable to the current Patent Application.

One case cited by the M.P.E.P., *Nitto Chem. Indus. Co., Ltd. v. Comer*, 39 U.S.P.Q.2d 1778 (D.D.C. 1994) is cited for the following proposition:

Commissioner's refusal to waive requirements of 37 C.F.R. 1.10 in order to grant priority filing date to patent application not arbitrary and capricious, because failure to comply with the requirements of 37 C.F.R. 1.10 is an “avoidable” oversight that could have been prevented by the exercise of ordinary care or diligence, and thus not an extraordinary situation under 37 C.F.R. 1.183.<sup>78</sup>

This broad statement does not apply to the facts concerning the filing of the present Patent Application. In *Nitto*, the petitioner requested an earlier filing date, but was found to have failed to present reliable evidence that two patent applications were deposited on a particular date.<sup>79</sup> In *Nitto*, the applicant's attorney prepared two patent applications (corresponding to applications filed in Japan) and then gave the applications to a secretary, who prepared two Express Mail packages containing the patent applications. Those two Express Mail packages were delivered to a mail clerk, who signed two Certificates of Mailing. Significantly, such Certificates of Mailing were required at the time, and had to be signed by the person actually mailing the item. The mail clerk then delivered the Express Mail packages to a mail courier, who was alleged to have deposited the

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<sup>77</sup> *Id.*

<sup>78</sup> M.P.E.P. § 513.

<sup>79</sup> See *Nitto*, 39 U.S.P.Q.2d at 1780.

Express Mail packages with the USPS. The applications were never received by the PTO.<sup>80</sup> The mail courier admitted in his deposition that he had no specific recollection of taking the Express Mail packages to the post office.<sup>81</sup> All of the First Class Mail that was contained in the courier's mail bag was received by the respective recipients. However, none of the eight Express Mail packages purportedly in the mail bag were received (including the two applications at issue).<sup>82</sup>

The district court held that the evidence of record was insufficient to conclude that the Commissioner acted in an arbitrary and capricious manner in denying the petition.<sup>83</sup> The court reasoned that the petitioner's Certificates of Mailing were without effect because, at that time, 37 C.F.R. § 1.10(b) required that effective Certificates of Mailing be "signed by the person mailing the paper or fee[.]" The petitioner's Certificates of Mailing were signed by the mail clerk as opposed to the mail courier.<sup>84</sup> The court also relied on the petitioner's failure to provide a copy of the Express Mail mailing receipts and failure to provide a direct statement from the mail courier that the mailing occurred on the date certified.<sup>85</sup> Thus, the Court found that the petitioner failed to satisfy the requirements of a Section 1.10 petition and that the Commissioner could not determine with certainty that the two patent applications had, in fact, been deposited on the date in question.<sup>86</sup>

Applicants' case is readily distinguishable. In the present case, the Commissioner can determine with certainty that Applicants did, in fact, deposit the Patent Application as Express Mail with the USPS January 19, 2001.<sup>87</sup> In stark contrast to *Nitto*, Applicants have presented the

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<sup>80</sup> See *id.* at 1779–1780.

<sup>81</sup> *Id.* at 1780–81.

<sup>82</sup> *Id.* at 1780.

<sup>83</sup> *Id.* at 1799.

<sup>84</sup> *Id.* at 1781.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See, e.g., Patent Application (Exhibit A); Treble Aff. (Exhibit B); C. Baker Aff. (Exhibit C); Byrd Decl. (Exhibit D); D'Antico Aff. (Exhibit F); Original Express Mail Confirmation (Exhibit G); Original Express Mail Label (Exhibit H); J. Baker Aff. (Exhibit U); and Prewitt Ltr. (Exhibit I).

Original Express Mail Label establishing that the Patent Application was mailed on January 19, 2001. Applicants have also presented a specific statement from the mail courier that the Patent Application was deposited with the USPS on January 19, 2001.

Another distinguishable aspect is that when Congress eliminated the requirement for 37 C.F.R. § 1.10(b) Certificates of Mailing by Express Mail, the requirement that Certificates of Mailing be signed only by persons actually mailing correspondence was also eliminated.<sup>88</sup> Thus, Applicants' Certificate of Mailing under 37 C.F.R. § 1.10 had effect as distinguished from the Certificate of Mailing in *Nitto*, which was "without effect."

Finally, Applicants released and made accessible to the public software using the invention claimed and described in the Patent Application on January 21, 2001, and applicants intend to file one or more corresponding patent applications in one or more foreign countries that may require absolute novelty as a prerequisite to patentability. Accordingly, the Commissioner has sufficient basis to determine that justice requires according January 19, 2001 as the filing date of the Patent Application instead of January 22, 2001.<sup>89</sup> Failure to do so would exalt form over substance, which the Federal Circuit has condemned in such prosecution matters:

Sound judgment, flexibility, and the careful following of considered processes are critical to ensuring that small mistakes do not become large ones, and that mistakes of form do not overwhelm the correctness of substance.<sup>90</sup>

Another case cited by the M.P.E.P. relating to the standard of care for Section 1.10 petitions is *Honigsbaum v. Lehman*, 903 F. Supp. 8, (D.D.C. 1995), *aff'd without opinion*, 95 F.3d 1166 (Fed. Cir. 1996). In *Honigsbaum*, the petitioner sought a waiver of Section 1.10 requirements in order to

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<sup>88</sup> See e.g., M.P.E.P. comments on 37 C.F.R. § 1.8—which specifically allow Certificates of Mailing for responses required to be filed in the PTO within a set period of time—contemplate action by an individual other than a signatory.

<sup>89</sup> DeSouza Aff. (Exhibit P).

obtain a filing date for a patent application. As in *Nitto*, however, the petitioner failed to produce an Express Mail mailing label for the patent application that was never received by the PTO.<sup>91</sup> The court reasoned that the petitioner's failure to provide any evidence corroborated by anything outside the office of submitting counsel was insufficient to establish circumstances warranting waiver.<sup>92</sup> The petitioner submitted three affidavits, a declaration, and copies of two pages of records from the submitting counsel's law firm, which the Commissioner deemed "not good enough proof" in the absence of an Express Mail mailing receipt.<sup>93</sup> The only Express Mail mailing receipt that the petitioner presented to the court was undated and bore no evidence of USPS handling.<sup>94</sup>

Again, the present case is readily distinguishable. Applicants have provided reliable evidence that the Patent Application was, in fact, deposited on—and entered the U.S. mailstream on—January 19, 2001.<sup>95</sup> Moreover, Applicants have provided substantial corroborating evidence originating from outside the office of submitting counsel.<sup>96</sup>

**C. Since Applicants filed the Patent Application in accordance with 37 C.F.R. § 1.10, the Commissioner should accord the January 19, 2001 date of deposit of the Patent Application as Express Mail with the USPS as the filing date of the Patent Application under 37 C.F.R. § 1.6.**

The Commissioner should accord the January 19, 2001 date of deposit of the Patent Application as Express Mail with the USPS as the filing date of the Patent Application under 37

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<sup>90</sup> *Helfgott & Karas, P.C. v. Dickenson*, 209 F.3d 1328, 1330 (Fed. Cir. 2000) (Commissioner found to have acted in arbitrary and capricious manner in denying petitioner's request to reinstate international prosecution of abandoned patent application).

<sup>91</sup> *Honigsbaum*, 903 F. Supp. at 9.

<sup>92</sup> *Id.* at 10.

<sup>93</sup> *Id.* at 9.

<sup>94</sup> *Id.* at 10.

<sup>95</sup> See, e.g., Patent Application (Exhibit A); Treble Aff. (Exhibit B); C. Baker Aff. (Exhibit C); Byrd Decl. (Exhibit D); D'Antico Aff. (Exhibit F); Original Express Mail Confirmation (Exhibit G); Original Express Mail Label (Exhibit H); J. Baker Aff. (Exhibit U); and Prewitt Ltr. (Exhibit I).

<sup>96</sup> See, e.g., Ltr. of Marsha L. Howard (Exhibit E); Original Express Mail Confirmation (Exhibit G); Original Express Mail Label (Exhibit H); Prewitt Ltr. (Exhibit I); DMM (Exhibit J); Second Express Mail Confirmation (Exhibit L); Second Express Mail Label (Exhibit M); Second Howard Ltr. (Exhibit Q); Post Office Instruction (Exhibit R); Express Mail Tracking & Delivery Confirmation EF062435872US (Exhibit S); and Ltr. of Belinda A. Willis (Exhibit T).



C.F.R. § 1.6, according to which “Correspondence filed in accordance with [37 C.F.R. § 1.10] will be stamped with the date of deposit as ‘Express Mail’ with the [USPS].” 37 C.F.R. § 1.6(a)(2). As discussed above, Applicants filed the Patent Application in accordance with 37 C.F.R. § 1.10. The date of deposit of the Patent Application as Express Mail with the USPS is January 19, 2001.<sup>97</sup> Thus, the Commissioner should accord the January 19, 2001 date of deposit of the Patent Application as Express Mail with the USPS as the filing date of the Patent Application under 37 C.F.R. § 1.6.

**D. Under 37 C.F.R. § 1.181, the Commissioner should accord January 19, 2001 as the filing date of the Patent Application.**

This Petition is proper under 37 C.F.R. § 1.181 because applicants have met the applicable criteria of 37 C.F.R. §§ 1.10(c)-(e). This Petition, therefore, presents a case in which a statute or the rules specify that the matter is to be determined directly by or reviewed by the Commissioner under 37 C.F.R. § 1.181(a)(2). Finally, Applicants submit that appropriate PTO handling of Express Mail in light of the USPS failure to follow Federal standards and local guidelines upon receiving shortpaid Express Mail thus presents an “appropriate circumstance” in which to invoke the supervisory authority of the Commissioner under 37 C.F.R. § 1.181(a)(3).

As required by 37 C.F.R. § 1.181(b), this Petition contains a statement of the facts involved and the point or points to be reviewed and the action requested—namely according January 19, 2001 as the filing date of the Patent Application. Briefs or memoranda, if any, in support hereof accompany or are embodied in the Petition, and where facts are to be proven, the proof in the form of affidavits or declarations (and exhibits, if any) accompany the Petition.

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<sup>97</sup> See, e.g., Patent Application (Exhibit A); Treble Aff. (Exhibit B); C. Baker Aff. (Exhibit C); Byrd Decl. (Exhibit D); D’Antico Aff. (Exhibit F); Original Express Mail Confirmation (Exhibit G); Original Express Mail Label (Exhibit H); J. Baker Aff. (Exhibit U); and Prewitt Ltr. (Exhibit I).

While Applicants do not believe a fee is due in conjunction with a 37 C.F.R. § 1.181 petition, Applicants hereby authorize the Commissioner to charge any and all fees required by this Petition to Applicants' Deposit Account 50-1273.

Applicants are ready, willing, and able to comply with any and all PTO requests for oral hearing if considered necessary by the Commissioner.

This Petition is timely under 37 C.F.R. § 1.181(f) because 37 C.F.R. § 1.10(c)–(e) provide that petitions are timely if filed “promptly.” After appropriate research into the circumstances of filing and the applicable legal precedent, Applicants have promptly prepared this Petition in a full and complete fashion to address all material issues.<sup>98</sup>

**E. Under 37 C.F.R. § 1.182, the Commissioner should accord January 19, 2001 as the filing date of the Patent Application.**

This Petition is proper under 37 C.F.R. § 1.182 because, as required of a 37 C.F.R. § 1.182 petition, and to Applicants' knowledge, other than as previously discussed:

i) Neither 37 C.F.R., the M.P.E.P. nor the Official Gazette caution against USPS failure to follow Federal standards and local practices upon receiving shortpaid Express Mail;

ii) Neither 37 C.F.R., the M.P.E.P. nor the Official Gazette caution against Post Office inconsistencies and irregularities that cannot be reasonably anticipated nor avoided by the exercise of reasonable care;

iii) 37 C.F.R. § 1.10 does not distinguish between sufficient postage and full postage;

iv) 37 C.F.R. § 1.10 does not address petitioning the Commissioner when the USPS assigns a “date-in” but fails to deliver correspondence consistently with that “date-in;”

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<sup>98</sup> *Nitto Chem. Indus. Co., Ltd. v. Comer*, 39 U.S.P.Q.2d 1778 (D.D.C. 1994) (petition filed under 37 C.F.R. § 1.183 thirteen (13) months after original application filed not found to be untimely).

v) 37 C.F.R. § 1.10 does not address petitioning the Commissioner when the USPS fails to properly deliver shortpaid Express Mail; and

vi) 37 C.F.R. § 1.10 does not address petitioning the Commissioner when correspondence is mailed with sufficient postage to trigger USPS delivery obligations, yet the USPS fails to deliver the correspondence to the PTO.

For at the least the foregoing reasons, Applicants respectfully submit that this Petition presents one or more situations not specifically provided for in the regulations of 37 C.F.R. Finally, in accordance with the petition fee set forth in 37 C.F.R. § 1.17(h) or elsewhere, Applicants hereby authorize the Commissioner to charge any and all fees required by this Petition to Applicants' Deposit Account 50-1273.

**F. Under 37 C.F.R. § 1.183, the Commissioner should accord January 19, 2001 as the filing date of the Patent Application.**

This Petition is proper under 37 C.F.R. § 1.183 because, as required of a 37 C.F.R. § 1.183 petition, because the USPS failure to follow Federal standards and local practices upon receiving shortpaid Express Mail presents an extraordinary situation for justice requires that the Commissioner exercise discretionary powers in according January 19, 2001 as the filing date of the Patent Application. On that date, in reliance upon representations made by the USPS, Applicants entrusted the Patent Application to the USPS and complied with applicable rules. The Patent Application would have been delivered to the PTO but for the USPS failure to follow those Federal standards and local practices upon receipt of the Patent Application. Further, less than one week before, the USPS had followed those very same standards in connection with a shortpaid mailing by Applicants' Attorneys.

Applicants did not consciously or deliberately deceive or delay transmission of the Patent Application to the Post Office or PTO, and neither the M.P.E.P. or Official Gazette caution against

Post Office inconsistencies and irregularities that cannot be reasonably anticipated nor avoided by the exercise of reasonable care. *See, e.g., Mobil Oil Corp. v. Dann*, 198 U.S.P.Q. 347, 349 n. 3 (D.D.C. 1978) (“In the Court’s view, the propriety of granting conditional relief under [37 C.F.R. § 1.183] is beyond question. Petitions under that provision are addressed to the sound discretion of the Commissioner on a showing of ‘an extraordinary situation, when justice requires.’ Because of that inherently flexible standard, the rule rightly authorizes the Commissioner to grant equally flexible forms of relief to do justice according to the facts of individual cases.”)

The PTO allows for occasional USPS imperfection.<sup>99</sup> Moreover, unanticipated postal irregularities and inconsistencies such as “unforeseeable mail delay” have been held within the contemplation of 37 C.F.R. § 1.183.<sup>100</sup> Accordingly, Applicants request that the Commissioner suspend or waive any requirements or regulations in 37 C.F.R. that prevent the Patent Application from being accorded January 19, 2001 as its filing date.

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<sup>99</sup> *See, e.g.*, 37 C.F.R. § 1.6(e) (“Interruptions in U.S. Postal Service”) and M.P.E.P. § 511 (“Postal Service Emergency Contingency Plan”).

<sup>100</sup> *See, e.g., Vertesi v. Gibson*, 181 U.S.P.Q. 734 (Comm’r Pats. 1974) (relief granted pursuant to 37 C.F.R. § 1.183 because an “unforeseeable mail delay” occurred).

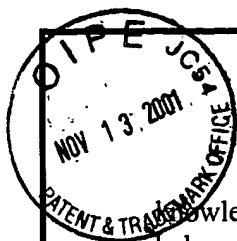
## VI. CONCLUSION

Applicants respectfully request reconsideration and hereby petition the Commissioner to accord the January 19, 2001 date of deposit of the Patent Application as Express Mail with the USPS as the filing date of the Patent Application. The USPS admittedly failed to follow Federal standards and local practices upon receiving the Patent Application as shortpaid Express Mail. Moreover, the USPS had followed these very same standards on behalf of Applicants' attorneys less than one week before the mailing of the Patent Application. The Applicants should not be made to suffer the potential loss of foreign filing rights at the whim and caprice of the USPS.

Respectfully submitted,

By: Kevin S. Kudlac  
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Reg. No. 36852

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## Certificate of Mailing under 37 C.F.R. § 1.10

Upon reasonable basis, information, and belief, I hereby certify, to the best of my knowledge, that this correspondence, including those papers, letters, or fees, if any, listed below or otherwise referred to as attached, enclosed, or otherwise affixed hereto, is being deposited with the U.S. Postal Service on the date set forth below with sufficient postage as Express Mail Post Office to Addressee in an envelope addressed to: Box DAC, Commissioner for Patents and Trademarks, Washington, D.C. 20231.

EF062174514US  
Express Mail Mailing Label Number

Nov. 13, 2001  
Date of Deposit

Jerry L. Lethin  
Name of Person Certifying Deposit

Jerry L. Lethin  
Signature of Person Certifying Deposit

### Correspondence Submitted Herewith:

Petition For a Corrected Filing Date Under 37 C.F.R. §§ 1.6, 1.10,  
1.181, 1.182, and 1.183 (135 pgs)

Patent Application.....	Exhibit A	(58 pgs)
Affidavit of Carol L. Treble .....	Exhibit B	(2 pgs)
Affidavit of Christopher A. Baker.....	Exhibit C	(2 pgs)
Declaration of Kelly M. Byrd.....	Exhibit D	(2 pgs)
Letter of Marsha L. Howard.....	Exhibit E	(1 pg)
Affidavit of John H. D'Antico.....	Exhibit F	(2 pgs)
Express Mail Tracking & Delivery Confirmation EF062434188US .....	Exhibit G	(1 pg)
Express Mail Mailing Label EF062434188US .....	Exhibit H	(1 pg)
Letter of Albert Prewitt .....	Exhibit I	(1 pg)
Sections of USPS Domestic Mail Manual.....	Exhibit J	(43 pgs)
Affidavit of David A. Porter.....	Exhibit K	(3 pgs)
Express Mail Tracking & Delivery Confirmation EF062173947US .....	Exhibit L	(1 pg)
Express Mail Mailing Label EF062173947US .....	Exhibit M	(1 pg)
Returned Postcard .....	Exhibit N	(1 pg)
Filing Receipt .....	Exhibit O	(4 pgs)
Affidavit of Patrick J. DeSouza.....	Exhibit P	(2 pgs)
Second Letter of Marsha L. Howard .....	Exhibit Q	(1 pg)
San Antonio District Instruction CSS-95-BC/S-011 .....	Exhibit R	(4 pgs)
Express Mail Tracking & Delivery Confirmation EF062435872US .....	Exhibit S	(2 pgs)
Letter of Belinda A. Willis .....	Exhibit T	(1 pg)
Affidavit of Jeffery M. Baker.....	Exhibit U	(2 pgs)

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